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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Amendment of Section 73.202(b) of the) MM Docket No. 98-176
Commission's Rules, FM Table of Allotments) RM-9363
(Killeen and Cedar Park, Texas))

To: The Chief, Allocations Branch

**REPLY COMMENTS OF GULFSTAR
COMMUNICATIONS KILLEEN LICENSEE, INC.**

GulfStar Communications Killeen Licensee, Inc. ("GulfStar"), the licensee of radio station KIIZ-FM, Killeen, Texas, by its attorneys, hereby submits its reply comments in response to the Commission's Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.¹ The Notice seeks comment on a Petition for Rulemaking ("Petition") filed by LBJS Broadcasting Company, L.P. ("LBJS") requesting the reallocation of Channel 227C from Killeen, Texas to Cedar Park, Texas, and the modification of its license for Station KLNC(FM) (formerly KAJZ(FM)), Killeen, to specify Cedar Park as KLNC(FM)'s community of license.

In its initial Comments in this proceeding, filed November 16, 1998, GulfStar demonstrated that a grant of the LBJS proposal would seriously undermine the Commission's policies and objectives as embodied in the FM Table of Allotments and

¹ DA 98-1939, released September 25, 1998.

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Section 73.207 of the Commission's rules. KLNC's present site violates Section 73.207 with respect to four FM stations: KLBJ, Channel 229C, Austin, Texas; KSTV, Channel 226C3, Dublin, Texas; KPLV, Channel 227C1, Port Lavaca, Texas; and KKZN, Channel 227C2, Haltom City, Texas. Thus, LBJS is proposing that the Commission make a new allotment (Channel 227C at Cedar Park) that is short-spaced to four different stations. One of these short-spacings – to KLBJ, Austin – existed prior to November 16, 1964, and LBJS argues that this short-spacing should be allowed to continue under the policy enunciated in *Newnan and Peachtree City, Georgia*, 7 FCC Rcd 6307 (1992). The other three short-spacings, however, arose subsequent to 1964. The Notice requested comment on whether the *Newnan* policy should not only be continued, but extended to encompass post-1964 short-spacings. GulfStar showed in its Comments that such an extension of the policy, allowing vast numbers of post-1964 violations of Section 73.207 to be carried over to new allotments in the form of community of license changes without changes in antenna site, would considerably undermine the FM Table of Allotments' purpose as the fundamental tool for preserving the technical integrity of the FM band.

Three other parties – LBJS, Texas Star Radio, Inc. and Cen-Tex Media, Inc. (“TSR/Cen-Tex”), and Fuller-Jeffrey Radio of New England, Inc. (“Fuller-Jeffrey”) – filed comments in response to the Notice. Only one commenter, however, discusses the merits of *extending* the *Newnan* policy to post-1964 short-spacings, as opposed to merely *continuing* the policy, which encompasses only pre-1964 grandfathered short-spacings. LBJS's comments, for instance, argue at length in favor of “continuation of the policy set forth in *Newnan/Peachtree City* and application of that policy to this proceeding.” LBJS

Comments at 4. LBJS, however, makes no specific mention of the fact that three of the short-spacings that a Channel 227C allotment at Cedar Park would entail arose subsequent to 1964. Similarly, Fuller-Jeffrey, which owns a pre-1964 grandfathered FM station at Berlin, New Hampshire for which it is seeking a community of license change, seems more concerned that the Commission not take steps to rescind the *Newnan* policy in its present scope. Fuller-Jeffrey does not address the merits of extending *Newnan* to include post-1964 short-spacings; in fact, it erroneously states that “the *NPRM*’s concern over post-1964 short-spacings appears to be misplaced in this proceeding.” Fuller-Jeffrey Comments at 4 n.2.

TSR/Cen-Tex are the only commenters that address the merits of extending *Newnan* to encompass post-1964 short-spacings. TSR/Cen-Tex support the notion of permitting unlimited community reallocations where no technical change in the relevant station’s facilities is being proposed. In fact, TSR/Cen-Tex are of the view that any proposed community reallocation should be allowed so long as the proposed reallocation comports with the Commission’s technical *application* rules. According to TSR/Cen-Tex:

The Commission is wrong in treating a request by an existing short spaced station to change community of license as a new allotment. The station is making a *major change* in its facilities and should be governed by current Commission rules as set forth in Sections 73.213 and 73.215 for these types of changes.

TSR/Cen-Tex Comments at 2 (emphasis in original). TSR/Cen-Tex also provide a telling statistic. They cite a recent petition for rulemaking by a digital audio broadcasting (DAB) proponent, which states that approximately 3,280 FM stations, or 60% of the FM stations in the country, have at least one short-spacing. TSR/Cen-Tex Comments at 2.

In GulfStar's view, the case presented by TSR/Cen-Tex is the case *against* extension of the *Newnan* policy to encompass post-1964 short-spacings. Assuming the reliability of the figure cited by TSR/Cen-Tex, there are over 3000 short-spaced FM stations. Almost certainly, the majority of these short-spacings have arisen after 1964, most via invocations of Sections 73.215 or 73.213 at the application stage. If it extends *Newnan* to allow these short-spacings to be carried over at the allotment stage through grants of community of license change proposals, so long as there is no facilities change or potential for increased interference, the Commission will be well down the road toward rendering the FM Table meaningless and acknowledging, as TSR/Cen-Tex contends, that such changes to the Table of Allotments should be treated as nothing more than facilities changes and governed under application standards.

Such an acknowledgement would contravene the Commission's long-held refusal to risk undermining the FM Table's integrity through relaxations of application standards. For instance, in adopting the "one-step" application process that allows certain channel modifications through applications, the Commission nonetheless held that "it is in the public interest to preserve the benefits of the current system by preventing the allotment of channels that would not meet our present allotment standards." Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application, 8

FCC Rcd 4735, para. 13 (1993) (“One-Step Order”). Thus, “one-step” applicants not only must specify a site meeting application requirements (which might include Section 73.215), but also must demonstrate that a suitable site exists which would comply with allotment standards with respect to minimum distance separation and city-grade coverage. Id. As the Commission noted, “there are some types of showings that are considered acceptable in connection with applications, *such as contour protection showings pursuant to Section 73.215 of the Rules* and showings of ‘substantial compliance’ with our city grade coverage requirements, that we have expressly declined to consider in connection with allotment proceedings.” Id., para. 6 (emphasis added). Additionally, and particularly relevant to the instant case, the Commission specifically refused to allow “one-step” applications to be used for community of license changes. Id., para. 20. An extension of the *Newnan* policy would fly in the face of these principles.

Moreover, despite its historic hesitance to speculate at the allotment stage as to a proponent’s future application motives, the Commission simply cannot blind itself to the fact that community of license changes are often stepping stones to subsequent applications that secure the proponent’s real planned objective: a move-in from a rural to an urban area (or from one urban area to a more lucrative urban area).² As just one case in point, GulfStar is aware of the case of FM station KQBT, Taylor, Texas. At one time, KQBT was licensed to Temple, Texas, and served areas in rural central Texas. The small

² Strangely, while the Notice did not raise the subject of LBJS’s future application plans for KLNC(FM), LBJS makes a point of arguing that “while it is possible that a licensee which has changed its community of license might at some point in the future also seek a

town of Taylor was located within KQBT's city-grade coverage contour just as Cedar Park is within the city-grade coverage contour of KLNC. Once KQBT was granted a change in community of license to Taylor, the station almost immediately applied to move its transmitter and antenna as far from Taylor as the Commission's technical application rules permitted, and as close to the major population center of Austin as possible.

Similar examples undoubtedly abound. A station first obtains a change in community of license without proposing a change in antenna site. Having obtained the change, it then seeks through an application to move its transmitting facility closer to a major population center while still being able to provide city-grade coverage to its "new" community. Thus, through this two-step process, the station is able to achieve a move-in to a more densely populated area that it would not have been able to obtain directly at the allotment stage. One of the fundamental purposes of the FM Table of Allotments has been to prevent the migration of rural stations into more populated areas. See, e.g., One-Step Order, para. 13 ("[t]he preservation of [the] allotment standards is necessary to prevent overcrowding and to promote a more even distribution of stations"). In addition to undermining the integrity of the FM Table by allowing potentially thousands of short-spacings to be carried over into new allotments, the opportunities for community of license changes to be used merely as devices to enable migrations of stations into urbanized areas also counsel against extension of the *Newnan* policy.


technical change in its facilities, such considerations are irrelevant in this proceeding." LBJS Comments at 7.

For the reasons set forth herein and in its initial Comments, GulfStar urges the Commission to deny the LBSJ proposal.

Respectfully submitted,

**GULFSTAR
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Dated: December 1, 1998

CERTIFICATE OF SERVICE

I, Claudia L. Lucas, a secretary in the law firm of Wiley, Rein & Fielding, hereby certify that copies of the foregoing "Reply Comments of GulfStar Communications Killeen Licensee, Inc." were sent this 1st day of December, 1998, by first class United States mail, postage prepaid, to the following:

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